STATE OF MICHIGAN

COURT OF APPEALS

ROBERT WRIGHT, JR.,

Plaintiff-Appellee/Cross-Appellant,

v

SHORE CREST LANES & LOUNGE, INC. d/b/a KLEATS, and BRADLEY WEBB,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
January 11, 2000

No. 203016
Macomb Circuit Court
LC No. 95-001913 NS

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendants appeal as of right from a jury verdict in favor of plaintiff. Plaintiff cross-appeals from an order taxing costs. We affirm the jury's verdict, remand so that plaintiff's future damages may be calculated using a simple interest formula rather than a compound interest formula, and remand for further proceedings concerning plaintiff's request for attorney fees.

Plaintiff was injured at Kleats bar on November 11, 1994 when he and a bouncer, defendant Bradley Webb, were involved in an altercation in the parking lot. Plaintiff's theory of the case was that he did nothing to provoke Webb's attack and that Kleats was vicariously liable for the assault and battery. Defendants' theory was that plaintiff was unruly and had used force against Webb compelling Webb to use force to contain plaintiff and expel him from the parking lot. The jury found in plaintiff's favor and awarded $24,225 for past economic damages, $47,500 for past non-economic damages, and $33,972.13 for future non-economic damages.

Defendants first argue that the trial court erred in instructing the jury with a non-standard instruction on self-defense which was inconsistent and inaccurately stated the law. Pursuant to MCR 2.516(D)(4), a trial court may give an additional instruction on applicable law not covered by a standard jury instruction and the additional instruction must be concise, understandable, conversational, unslanted, and nonargumentative. A jury verdict may be vacated because of improper jury instructions only where the failure to comply with MCR 2.516 amounts to an error or defect in the trial so that failure to set

aside the verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 326; NW2d (1985); MCR 2.613(A).

The trial court instructed the jury with regard to the issue of self-defense as follows:

> A person who is assaulted may use such reasonable force as may be or reasonably appears at the time to be necessary to protect him or herself from bodily harm in repelling the assault. The person who is attacked by another and retaliates with force that is greater than necessary to replace [sic] the attack is himself an attacker, and the defense of self-defense will not be available to that person.

Defendants take issue with the latter half of the instruction because it is not a standard instruction and defendants contend that the instruction withheld from the jury's consideration Webb's subjective belief regarding whether he was being threatened by plaintiff. In so doing, defendants seek to divorce the second sentence of the instruction from the first. However, in its totality, the import of the instruction is that one who uses more force than is allowed by the first sentence of the instruction may not claim self-defense. This is an accurate statement of the law. See *Kent v Cole*, 84 Mich 579, 581; 48 NW 168 (1891). In addition, the evidence at trial supported such an instruction. Several witnesses testified that plaintiff did not instigate any physical contact with Webb and that Webb was the aggressor. Even if the jury believed Webb's testimony that plaintiff was being physically aggressive, the instruction accurately informed the jury that if it determined that Webb reacted with force in excess of that necessary to repel the attack, he could not rely on a theory of self-defense.

Accordingly, the trial court's instruction on self-defense was an accurate and applicable statement of the law and complied with the requirements of MCR 2.516(D)(4).

Defendants next argue that the trial court erred in prohibiting them from calling Bill Lodge, an apparent employee of Kleats bar, as a witness. The decision to exclude a witness who was not listed on a party's witness list is reviewed for an abuse of discretion. *Gillam v Lloyd*, 172 Mich App 563, 584; 432 NW2d 356 (1988).

It is undisputed that defendants failed to list Lodge as a witness. Defendants maintain that plaintiff had notice that Lodge may be called because his name was mentioned in at least one deposition and defendants' witness list included "any and all past and present agents and employees of Shore Crest Lanes & Lounge, d/b/a Kleats Lounge, but not limited to the following." However, such a general description by category is not sufficient to alert the opposing party of who will be called to testify at trial. *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 778; 404 NW2d 665 (1987). In addition, defendants have failed to offer an explanation regarding why Lodge's name was not specifically included on their witness list or why, after determining that he would testify, defendant did not amend the witness list at an earlier date. Thus, defendants have failed to show good cause as to why Lodge should have been allowed to testify. *Id.* at 779.

Defendants next contend that the trial court abused its discretion by violating its prior ruling and allowing plaintiff to question Webb regarding a police statement and not allowing defendants to ask

follow-up questions to show that no criminal charges were brought. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Davidson v Bugbee,* 227 Mich App 264, 266; 575 NW2d 574 (1997). It is clear from the record that plaintiff did not question Webb regarding the police statement; rather, Webb volunteered the testimony. Therefore, there is no error.

Next, defendants claim that the trial court erred in denying defendant Kleats' motion for directed verdict. A trial court's decision regarding a motion for a directed verdict is reviewed de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When evaluating a motion for a directed verdict, the court must consider the evidence in a light most favorable to the nonmoving party, make all reasonable inferences in favor of the nonmoving party, and determine whether a factual question exists upon which reasonable minds may differ. *Id.*

Plaintiff's complaint alleged claims of intentional tort (assault and battery) with respect to Webb, and respondeat superior and premises liability with respect to the bar. At trial, it was plaintiff's contention that defendants had a duty to adequately train and supervise Webb, failed to do so, and, as a result of this failure, Webb was ill-prepared to handle the situation and plaintiff was harmed.

Plaintiff presented sufficient evidence to withstand defendants' motion for a directed verdict. Webb testified that he was never given written instructions regarding how to handle patrons. Instead, he received on-the-job training and understood that he could use physical force "when necessary." He admitted to consuming at least two alcoholic beverages that night. Webb thought that his manager, Teman Mona, may have seen him drinking one of them, yet Mona never reprimanded Webb for this behavior. Mona testified that there were written rules regarding employee drinking, but that no such rules existed regarding ousting rowdy patrons. Mona testified that the bouncers were told to try to be nice and only respond with force when the patron first uses force, and that the bouncers should always try to respond with less force than the patron. At no time was a bouncer to use force where no force had been exerted upon him. Plaintiff's friend, Scott Demand, who was also a bouncer at Kleats, confirmed that the bouncers never received formal instructions or were told how much force was appropriate, but were simply instructed to watch and learn. Demand witnessed Webb drinking that night. Richard Serventi, who was in charge of running Kleats, was not aware of whether any formal instructions were given to the bouncers. However, Serventi testified that bouncers could use reasonable force to meet a patron's aggression, but that it would be excessive force if a bouncer was physical when he was merely pushed by a patron.

While it is true that plaintiff did not call an expert witness to testify regarding how the bouncers should be trained, a jury could infer that the bouncers at Kleats did not have a proper understanding concerning what was expected of them. Taking the evidence in a light most favorable to plaintiff, Webb obviously was not aware that he was expected to use *less* force than the patron and that it would be excessive force for him to respond physically when he had merely been pushed. Also, there was evidence that plaintiff did not push Webb at all. In that instance, both Mona and Serventi agreed that any amount of force by a bouncer would be unacceptable. In addition, the evidence showed that Webb's manager may have seen him drinking, but did nothing to stop this behavior. Again, the jury could infer that Kleats was negligent in allowing an employee to drink when that employee may need to use force at a later time. Because plaintiff presented evidence upon which reasonable minds could

differ, a directed verdict was inappropriate. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

On cross-appeal, plaintiff argues that the judgment must be amended to provide that the reduction of future damages to present cash value be calculated using a simple interest formula. We agree. While this case was on appeal, our Supreme Court held that reduction of future damages to present cash value under MCL 600.6306; MSA 27A.6306 is to be calculated using simple interest. *Nation v W D E Electric Co*, 454 Mich 489, 499; 563 NW2d 233 (1997). Although plaintiff initially moved for a remand before this Court while the appeal was pending, this Court denied the motion in an unpublished order issued on October 9, 1997. However, this Court's order also provided that plaintiff could raise the issue on cross-appeal and, should plaintiff succeed on the merits, the trial court would be ordered to amend the judgment.

Defendant maintains that *Nation* cannot be applied retroactively. Because this case was on appeal when the Supreme Court decided *Nation*, limited retroactivity applies and the case must be remanded so that plaintiff's future damages may be calculated using a simple interest formula. *Jahner v Dep't of Corrections*, 197 Mich App 111, 115-116; 495 NW2d 168 (1992). See also *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 521-522; 592 NW2d 786 (1999) (applying the Supreme Court's holding in *Nation* where the jury's verdict was rendered before that decision).

Lastly, plaintiff argues that the trial court abused its discretion in failing to award his requested attorney fees. Initially, there is some dispute whether sanctions are appropriate under MCR 2.403(O) (mediation sanctions) or MCR 2.405(D) (offer of judgment sanctions). On January 29, 1996, a unanimous panel rendered a mediation award in plaintiff's favor in the amount of $50,000. Both parties rejected the mediation award. On March 4, 1996, plaintiff submitted an offer of judgment in the amount of $75,000. Defendants rejected the offer of judgment on March 12, 1996 and counteroffered an amount of $1,500. Plaintiff rejected the counteroffer. The case proceeded to trial, which occurred over seven days in March 1997. The jury's verdict of $135,697.13 was entered in an order dated April 14, 1997.

Because of the jury's verdict, plaintiff would be entitled to mediation sanctions, MCR 2.403(O)(1), and offer of judgment sanctions, MCR 2.405(D)(1). As the parties note, under MRE 2.405(E), as it was written at the time that plaintiff moved for sanctions, stated:

> In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

Because plaintiff was entitled to costs under both rules, plaintiff is entitled to recover sanctions from the earlier rejection, here, the mediation rejection. *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 431; 552 NW2d 466 (1996). Thus, MCR 2.403(O) applies and plaintiff is entitled to recover actual costs, including reasonable attorney fees, from the date of defendants' rejection of the

mediation award, that being February 26, 1996. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co, Inc,* 194 Mich App 230, 235; 486 NW2d 68 (1992).

MCR 2.403(O)(6) provides that the actual costs constituting those that must be awarded are (1) costs taxable in any civil action and (2) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial court for services necessitated by the rejection of the mediation evaluation. Here, plaintiff requested costs in the amount of $3,280.15 and the trial court awarded that amount. Defendant does not contest this award of costs. Plaintiff also requested attorney fees in the amount of $22,093; however, the trial court awarded plaintiff $7,500 in attorney fees. The trial court did not hold an evidentiary hearing and did not make any factual findings in this regard. Rather, the trial court stated:

> The Court has reviewed the attorney services performed and the attorney was very successful in the trial in this matter. However, in view of the fact that both people rejected mediation, and I know there was some offers of judgment in the matter, however, the Court is going to award, I got the figure down, $7,500.00

The factors to be considered when determining what constitutes reasonable attorney fees are listed in Michigan Rule of Professional Conduct 1.5(a), which include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *RCO Engineering, Inc v ACR Industries, Inc,* 235 Mich 48, 67; 597 NW2d 534 (1999). A trial court's award of attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co,* 216 Mich App 612, 625-626; 550 NW2d 580 (1996).

Although a trial court is not limited to the above-stated relevant factors in determining the reasonableness of the fee and the trial court need not detail its findings as to each specific factor considered, *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982), the trial court's award constitutes an abuse of discretion. In the present case, the trial court did not consider any of the relevant factors, nor was there any finding that plaintiff's requested attorney fees were or were not reasonable. The trial court's apparent reason for rejecting plaintiff's requested attorney fees, that both parties rejected mediation, is not a recognized reason for reducing requested fees, especially where such a reason is contrary to the rule itself. The fact that a party rejects a mediation award does not preclude it from later being entitled to actual costs under the rule; rather, the verdict must only be more favorable to the rejecting party than the mediation evaluation. MCR 2.403(O)(1). Moreover, the award of actual costs is mandatory, not discretionary, *Great Lakes Gas Transmission Ltd Partnership v Markel,* 226 Mich App 127, 130; 573 NW2d 61 (1997), and only the amount or reasonableness of the attorney fees is left to the trial court's discretion.

Accordingly, we remand to the trial court for it to consider the relevant factors as noted in MRPC 1.5(a), any other factors it may deem relevant, and to determine what constitutes a reasonable attorney fee. See, e.g., *Smolen v Dahlmann Apts, Ltd*, 186 Mich App 292, 296-299; 463 NW2d 261 (1990). These findings should be specifically stated on the record.

The judgment for plaintiff is affirmed, the case is remanded so that the reduction of future damages to present cash value may be calculated using simple interest and for the trial court to reconsider plaintiff's requested attorney fee. We retain jurisdiction to review the trial court's ruling with respect to its award of attorney fees.

/s/ Helene N. White
/s/ Harold Hood
/s/ Kathleen Jansen